Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ALEX WAYNE BOLT, NABESNA MINING PARTNERS, and WHITE MOUNTAIN MINING PARTNERS,

Petitioners,

vs.

PTARMIGAN COMPANY, INC.

Respondent.

Petition For Writ Of Certiorari To The Supreme Court of the State of Alaska

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PETITION FOR WRIT OF CERTIORARI

ALEX WAYNE BOLT
1317 W. Northern Lights
Suite 100
Anchorage, Alaska 99503
(907) 258-6100
Petitioner

May 30, 1996

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QUESTIONS PRESENTED

1. Whether the Alaska Supreme Court lacked jurisdiction to continue the appeal subsequent to petitioner's filing of a chapter 11 petition in U.S. Bankruptcy Court.

2. Whether all orders and decisions of the State Superior Court and the Alaska Supreme Court are void subsequent to the date defendant/petitioner Bolt filed a chapter 11 petition in U.S. Bankruptcy Court.

3. Whether respondents willfully violated 11 U.S.C. § 362 and are subject to compensatory and punitive damages under 11 U.S.C. § 362(h) and Civil Rule 11.

4. Whether U.S. Bankruptcy Court relief from stay orders entered without notice and hearing as statutorily required under 11 U.S.C. § 362(d) are void and without effect.

5. Whether fraud can be effectively established as an issue preclusion sanction order by mere allegations by respondent's counsel rather than by clear and convincing standards set by state statutory provisions and clear legal precedent.

6. Whether it is arbitrary, capricious, and unreasonable and in violation of substantive due process for entry of issue preclusion litigation ending sanction order, which established fraud, without any notice and hearing to decide the issue of fraud under clear and convincing evidence standards.

7. Whether the State Superior Court's issue preclusion order of March 31, 1992, which effectively deprived defendant petitioners of leasehold property rights and effectively resulted in litigation ending default sanctions, required clear and convincing evidence standards and constitutional due process hearing before such issue preclusion order could be statutorily effective.

8. Whether the Alaska Supreme Court erred in affirming the lower court's issue preclusion order which effectively ended the case under default litigation ending sanctions, without constitutional due process.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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PTARMIGAN COMPANY, INC.
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Petition For Writ Of Certiorari To The Supreme Court of the State of Alaska

PETITION FOR WRIT OF CERTIORARI

Petitioners Alex Wayne Bolt, Nabesna Mining Partners, and White Mountain Mining Partners respectfully pray that a Writ of Certiorari issue to (i) review and vacate the opinion of the Supreme Court of the State of Alaska dated November 24, 1995, that was entered without jurisdiction, (ii) to review and vacate the Supreme Court of the State of Alaska's denial order of petitioners' Rehearing Petitions to the Supreme Court of the

State of Alaska dated December 28, 1995, and (iii) to review and vacate the trial court's order which established fraud without notice and hearing and without having before it any clear and convincing evidence.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of the State of Alaska in the case below is reported at 906 P.2d 1357 (attached as App. A7-A26). The order denying petitioner's Petition for Rehearing to the Supreme Court of the State of Alaska is at App. A1. The State of Alaska Superior Court's litigation ending Preclusion Order which established fraud without notice and hearing in violation of constitutional due process is at App. A2-A3. Respondent's Motion to Set Trial and Certificate of Counsel of Readiness for Trail is at App. A4-A6.

JURISDICTION

The Superior Court for the State of Alaska entered an amended final judgment dated April 15, 1993. Timely notices of appeal were filed May 17, 1993. The Supreme Court of the State of Alaska entered a decision on November 24, 1995. See App. A7-A26. Petitions for Rehearing were filed on December 4, 1995, and were denied by Order filed on December 28, 1995. See App. A1. The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

This case concerns Grants of Mining Rights between Ptarmigan Co., Inc. (Ptarmigan) ("Respondent") and Wayne Bolt ("Bolt") and subsequent assignments, cancellations of

assignments, and quitclaim deeds by and between Nabesna Mining Partners ("NMP"), White Mountain Mining Partners ("WMMP"), Colorado Resources, Inc. ("CRI"), and Newmont Exploration Ltd., ("Newmont"). "Bolt", "NMP", and "WMMP" are petitioners in this Petition for Writ of Certiorari. "Bolt" is an individual that negotiated the two original Mining Grants with Respondent. "Bolt" then formed Nabesna Mining Partners in 1983 and White Mountain Mining Partners in 1984 to explore and develop the old and famous historical Nabesna gold mine at Nabesna, Alaska. "Bolt contributed his interest in the Grants to the partnerships as his contribution to the partnerships to form the partnerships. "Bolt" has served as general partner of both partnerships since inception. After exploration and discovery of a significant gold discovery at Nabesna, Bolt, as general partner, negotiated WMMP's acquisition of controlling interest in "CRI" and was elected president and chairman of the board for CRI in January, 1987. In September 1988, NMP and WMMP assigned their interest in the Grants to CRI, subject to payments of CRI stock and specified cash payments by CRI. Bolt, with authorization by the CRI board, negotiated a CRI-Newmont Nabesna mining agreement, whereby CRI assigned, without warranty or representation, the Grants to Newmont Exploration Limited — a subsidiary of Newmont Gold Corporation, the largest producer of gold in the world. Bolt owns a minority interest in both "NMP" and "WMMP" and personally owns less than one percent of CRI's capital stock.

"NMP" performed about $400,000 of mineral exploration on the Rambler claims between July and October, 1983, and made a significant discovery of high grade gold

reserves. The Bureau of Land Management (BLM), by letter notice dated December 13, 1983, noticed respondent that the Rambler claims were void due to respondent's failure to file the 1982 notice of assessment work. A conditional Amended Grant dated July 2, 1984, was negotiated and signed between "NMP" and respondent wherein respondent agreed to appeal the BLM invalidation notice of the Rambler claims. As a part of the Amended Grant, respondent Ptarmigan entered into a Second Grant of Mining Rights with "Bolt" for 15 contiguous patented White Mountain claims on which the old historical Nabesna Gold Mine is located. "Bolt" formed "WMMP" and contributed the second Grant of Mining Rights to "WMMP", which was organized to explore and develop the patented claims.

The Interior Board of Land Appeals (IBLA) affirmed the BLM decision and respondent elected not to further litigate or appeal the BLM December 13, 1983, invalidation notice. "Bolt", on behalf of NMP, litigated the invalidation notice in the U.S. District Court, Anchorage, Case No. A87-106-Civ, which eventually also affirmed the IBLA decision. Bolt then filed an appeal to the Ninth Circuit Court of Appeals. See Bolt v. United States and Ptarmigan, 944 F.2d 603 (9th Cir. 1991). The Ninth Circuit, citing United States v. Locke, 471 U.S. 84 (1985), ruled in September, 1991, that the Rambler mining claims were void due to the negligent acts of respondent by not filing the required annual notice of assessment work required by federal law, making the Rambler claims void at the time respondent signed the Grant with Bolt.

As a part of the CRI/Newmont Mining Agreement, Newmont attempted to revalidate the Rambler claims through

an agreement with Ahtna Native Corporation (Ahtna) who could legally select the Rambler land under ANCSA (Alaska Native Claims Settlement Act), obtain interim conveyance, and lease those lands to Newmont. This Newmont-Ahtna agreement would have essentially re-validated the Rambler claims which had been earlier forfeited by respondent. The Newmont-Ahtna deal collapsed as a direct result of respondent's misconduct with certain CRI investors, including the original founders and investment bankers of CRI, who filed a hostile take-over derivative lawsuit to take the Newmont-CRI-Ahtna mining venture away from CRI, NMP, and WMMP. Due to the derivative "strike" lawsuit, CRI was unable to make payment of the specified cash payments to "NMP" and "WMMP" as was required in the September 27, 1988, assignments to CRI. Both "NMP" and "WMMP" cancelled their previous September 27, 1988, assignments to CRI and recorded the cancellations on May 17, 1989. Newmont subsequently terminated its agreement with CRI and Ahtna. The Nabesna Mining Venture was the only material asset of CRI, which had no funds to continue in business without the Newmont agreement. On September 11, 1989, the Board of Directors of CRI filed Chapter 7 in the U.S. Bankruptcy Court in Anchorage.

Newmont re-assigned whatever interest it had in the Grants back to "CRI" by quitclaim document on July 15, 1989. "WMMP" made the monthly payment to respondent under the Grant for August 1989. "NMP" and "WMMP" expressly invoked force majeure under the Ptarmigan Grants on September 1, 1989. "NMP" owed no monies to Ptarmigan due to respondent's lack of title to begin with. "WMMP" had

made all monthly payments to Ptarmigan up through August, 1989. Subsequently, on September 6, 1989, respondent Ptarmigan demanded Newmont to quitclaim the "NMP" and "WMMP" Grants to Ptarmigan. Notwithstanding Newmont's earlier quitclaim back to "CRI", Newmont also issued a quitclaim to Ptarmigan on September 21, 1989. After almost a year, Ptarmigan convinced CRI's chapter 7 trustee's attorney to pull the Grants back into the CRI estate and offered the trustee $47,000 for the estate's interest in both Grants. However, the trustee made no attempts to assume or reject any interest in the Grants under 11 U.S.C. § 365 within the statutory 60-day period, making any assumption void and statutorily defective. The CRI trustee eventually deeded the Grants to respondent on September 14, 1990, for only $3,500.

Respondent filed suit in State Superior Court to allegedly clear title over the Grants on October 31, 1990, based on (1) Newmont's quitclaim to Ptarmigan of September 21, 1989, and (2) the trustee's deed on September 14, 1990. Respondent had previously forfeited all right, title, and interest to the Rambler claims on December 30, 1982, prior to signing the Grant with Bolt. See Bolt v. United States and Ptarmigan, 944 F.2d 603 (9th Cir. 1991). Ptarmigan's counsel in State Superior Court was the wife of CRI's bankruptcy trustee's attorney. Petitioners' (defendants) counsel was appointed by petitioners' insurer under reservations of rights. Over defendants' objections, insurer appointed counsel represented all defendants, although conflicts of interest existed between the three defendants, counsel and insurer.

Respondent filed a motion for summary judgment which was denied on October 19, 1991. Respondent Ptarmigan had

previously moved for a trial date and certified its readiness for trial and filed its witness list and exhibit list containing 131 exhibited documents which respondent had obtained in discovery. Petitioners had previously produced thousands of documents, to include the 131 specific exhibits listed on respondent's exhibit list when respondent had moved to set a trial date. Alleged discovery disputes centered on tax returns for Wayne and Ann Bolt and Alaska Drilling, Inc., a non-party to the litigation. Petitioners offered to produce the requested tax returns to the court for in camera review or under a protective order. Respondent ignored petitioners' agreement to produce documents and moved for discovery sanctions. In October, 1991, petitioners' insurer filed a declaratory judgment action in the U.S. District Court (case no. A91-478-Civ-JKS) seeking a declaration of no coverage of the Ptarmigan lawsuit. Petitioners moved for a protective order over the tax returns in the Ptarmigan case. Respondent filed a second motion for discovery sanctions before the first motion for sanctions had been heard seeking an absolute default judgment. The trial court denied the protective order and entered the first sanction order requiring production of tax returns for "Bolt", and then entered the preclusion order March 31, 1992, which established fraud against petitioners without notice and without any hearing. See App. A2-A3. Petitioners demanded their insurer to allow independent counsel to defend defendants under CHI v. Employers, a case whereby the Supreme Court of the State of Alaska opined that insureds have a right to select and engage independent counsel at the insurer's expense when an insurer accepts defense under reservations of rights and subsequently initiates a declaratory judgment action to defeat defense

coverage. See CHI of Alaska, Inc. v. Employers, 844 P.2d 1113 (Alaska 1993).

A hearing was set on respondent's second motion for sanctions, April 27, 1992. The hearing was held on May 1, 1992. Insurer appointed counsel remained as counsel for defendants at the May 1, 1992, hearing. Orders entered at the hearing of May 1, 1992, included: (a) order denying petitioners' motion for partial summary judgment; (b) order for default on Ptarmigan's second motion for sanctions; (c) final order and judgment quieting title to mining claims; and (d) order allowing insurer appointed counsel to withdraw as defendants' counsel at the end of the hearing. The case was over and insurer appointed defense counsel departed the case after they were instrumental in defaulting petitioners out of the case.

Although the trial court entered default under respondent's second motion for sanctions at the May 1, 1992, hearing, the litigation continued in the trial court for another full year. Substantive post-default pleadings gathered momentum and complexities. Petitioners' insurer eventually authorized independent counsel for "WMMP". Petitioners' insurer finally agreed to pay for separate independent counsel for "Bolt" and separate independent counsel for "NMP".

Many substantive motions were presented, opposed, reconsidered, and disposed of during the next year — subsequent to entry of final judgment. These pleadings included the following that were disposed of without hearings: (a) Ptarmigan's motion to determine damages, May 6, 1992; (b) Ptarmigan's motion for attorney fees, May 6, 1992; (c)

defendants' motion for reconsideration of the May 1 default order, May 11, 1992; (d) Ptarmigan's motion with memorandum to amend judgement of May 12, 1992; (e) order denying motion for reconsideration; (f) opposition to motion to amend judgment of May 21, 1992; (g) stipulation and protective order of June 5, 1992; (h) defendants' first appeal pleadings and dismissal of June 15, 1992; (i) post judgment pleadings, reconsideration, motions to vacate, opposition to wording on orders, motions and oppositions to amend complaint; (j) motion to amend and file counterclaims of January 8, 1993; (k) amended answer and counterclaim of January 8, 1993; (l) NMP's motion for summary judgment declaring Ptarmigan had no right, title, or interest to Rambler claims of January 8, 1993; (m) the trial court's orders of March 19, 1993; (n) the trial court's order of April 14, 1993; (o) the trial court's orders of April 15, 1993; and (p) amended final judgment dated April 15, 1993.

Petitioners' insurer obtained a summary judgment order on March 17, 1993, in violation of 11 U.S.C. § 362, in their declaratory judgment action in U.S. District Court that no coverage existed for insureds in the Ptarmigan lawsuit. See related Petitions for Certiorari no. 95-1120 and 95-1212. Petitioners' insurer immediately denied further payment to independent counsel in the Ptarmigan case in March 1993. Petitioners' counsel all withdrew when the insurer stopped paying for the defense.

The Ptarmigan litigation and the insurer declaratory judgment action forced petitioner Bolt to file a chapter 11 petition in U.S. Bankruptcy Court, District of Alaska, on August 23, 1993. Respondent filed a motion to the Alaska

Supreme Court to stay the pending appellate proceedings which was denied. Ptarmigan obtained an *ex parte* order of relief from stay without notice and without hearing in "Bolt's" pending bankruptcy. The Alaska Supreme Court refused to stay oral arguments on appeal in the Ptarmigan case and refused to stay any review in the proceedings. Without jurisdiction, the Alaska Supreme Court entered a decision and affirmed the issue preclusion order of March 31, 1992, which effectively served as a litigation ending default sanction and established fraud by petitioners without any clear and convincing evidence and without any proper notice and hearing, which violates constitutional due process.

REASONS FOR GRANTING THE PETITION

The trial court's preclusion order of March 31, 1992, and resulting litigation ending default sanctions were unconstitutional, violative of substantive due process, and in conflict with well settled legal precedent. On appeal, the Alaska Supreme Court made clear legal error and either misapprehended or carelessly ignored the facts of the case and due process violations and conflicting decisions of other courts and even of their own recent decisions. Litigation ending preclusion orders and default sanctions that terminate cases and controversies without trial on the merits must be carefully weighed and justifies review by higher courts, especially when issues of fraud are alleged and when property rights are extinguished in violation of constitutional due process. In order to dismiss by sanction, a case raising fraud issues, fraud must be proven "clearly and convincingly" since default judgments are fundamentally punitive. The Supreme Court of

the United States has required a standard of clear and convincing evidence or even "beyond a reasonable doubt" to sustain punitive damage awards. These standards were not followed by the Alaska Supreme Court in its review of this case, giving rise to this petition. Further, the Alaska Supreme Court chose to ignore bankruptcy statutes and well settled law as to automatic stay protection to debtors. Petitioners' property rights can only be regained through review by this court. This court should grant this petition and allow petitioner to present his petition on the merits, which would permit appropriate review of clear judicial error and the misconceptions by the Supreme Court of the State of Alaska of statutes and well settled law pertinent to the case. Judicial activism by the lower courts is without jurisdiction, violates the law, and has no constitutional basis. Errors in the courts below are often repeated and is contemptuous of the law and the state and federal constitutions. This court has an obligation and duty to review the errors in the case below.

ARGUMENT I — The Alaska Supreme Court and the State Superior trial court lacked jurisdiction, without effective statutory relief from stay under 11 U.S.C. § 362, to continue any aspect of the case below once defendant/petitioner filed his chapter 11 petition in the U.S. Bankruptcy Court.

Defendant/petitioner Bolt filed for chapter 11 protection on August 23, 1993, and subsequently moved for stays in both the Alaska Supreme Court and the State Superior Court. Respondent moved for a relief from stay order which was opposed by petitioners. Although opposition was filed,

respondent's counsel falsely certified (i) the time had expired for filing opposition and (ii) no timely opposition had been filed. Respondent's counsel then immediately presented an *ex parte* "order of relief from stay" to the bankruptcy court which immediately signed the order. Petitioners were not serviced with a copy of the order of relief for stay until after it was signed by the bankruptcy court judge. The order was granted without either proper notice or hearing as statutorily required under 11 U.S.C. § 362(d), making the relief from stay statutorily defective and void.

Respondent's counsel filed the statutorily defective relief from stay order in the Alaska Supreme Court, to "allow continuation of the appeal." No relief from stay order has ever been filed in the State Superior Court which continued to prosecute collateral issues without jurisdiction, after the appeal had passed to the Alaska Supreme Court. The State Superior Court vacated and modified some of its previous orders and entered new orders without any relief from stay order. Petitioners sought a stay from the ongoing state court litigation to no avail. The State Superior Court denied petitioner's motion for stay and allowed the proceedings to continue.

Respondent continued to prosecute the appeal through oral argument and decision before the Alaska Supreme Court in willful violation of the stay. While protected by the stay, the Alaska Supreme Court rendered a decision adverse to petitioners on November 24, 1995, while Bolt remains in bankruptcy proceedings and is protected by the automatic stay provisions under 11 U.S.C § 362. The statutory purpose of the stay is to preserve the status quo and to prevent actions by creditors which would be inconsistent with the bankruptcy goal

of equal treatment. In re Roach, 660 F.2d 1316 (9th Cir. 1981); Hunt v. Bankers Trust Co., 799 F.2d 1060 (5th Cir. 1986); In re Parr Meadows Racing Association, Inc., 880 F.2d 1540 (2nd Cir. 1989).

The stay applies to pending appeals. Celotex v. Edwards, 115 S.Ct. 1493, 1498-99 (1995); Ellison v. Northwest Engineering Company, 707 F.2d 1310 (11th Cir. 1983); Cathey v. Johns-Manville Sales Corp., 711 F.2d 60 (6th Cir. 1983), cert. denied 106 S.Ct. 3335 (1986); Commerzanstalt v. Telewide Systems, Inc., 790 F.2d 206 (2nd Cir. 1986); Ingersoll-Rand Financial Corp v. Miller Mining Co., 817 F.2d 1424 (9th Cir. 1987) (appeal by debtor).

In Ingersoll-Rand Financial Corp. v. Miller Mining Co., Inc., 817 F.2d 1424 (9th Cir. 1987) the Ninth Circuit Court of Appeals stated in part at page 1427 that:

> We agree, however, with the decisions of other circuits which have stayed appeals by the debtor when the original proceeding was brought against the debtor. The Sixth Circuit in Cathey v. Johns-Manville Sales Corp., 711 F.2d 60, 62 (6th Cir. 1983), cert. denied, ___ U.S. ___, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986), followed the Third Circuit's rationale stating:
>
> > In our view, section 362 should be read to stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at its

> inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.

Respondent's continuing prosecution of the action below was in willful violation of the automatic stay and entitles petitioners to compensatory and punitive damages under 11 U.S.C. § 362(h). See In re Taylor, 884 F.2d 478 (9th Cir. 1989). [The 9th Circuit] recently adopted clear standards for a "willful violation" of the automatic stay in In re Bloom, 875 F.2d 224 (9th Cir. 1989).

Under the rule of Bloom, the conduct of the respondent's attorneys in this case at bar was a "willful violation" of the stay that was automatically imposed upon petitioner's filing of his chapter 11 petition.

Petitioners have argued these issues to the Alaska Supreme Court which has summarily ignored the law of this issue. The Alaska Supreme Court has made clear error in allowing this appellate action to continue through oral argument and by rendering a decision and awarding costs while petitioners were protected by 11 U.S.C. § 362. See Celotex v. Edwards, 115 S.Ct. 1493, 1498-99. Such judicial actions are clearly erroneous and must be set aside based on the evidence in the record. See C.I.T. Corp. v. Duncan Grading and Construction, 739 F.2d 359, 362 (8th Cir. 1984) and United States v. Unites States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed 746 (1948).

The automatic stay provisions established in 11 U.S.C. § 362 suspends any non-bankruptcy court's authority to continue judicial proceedings then pending or "related" to

proceedings against the debtor. See Celotex v. Edwards, 115 S.Ct. 1493, 1498-99. All defendants/petitioners are so intertwined, interconnected, inseparable, and "related" so as to be protected by the automatic stay provisions of 11 U.S.C. § 362, making all orders and judgments entered against all defendants/petitioners void *ab initio*. Clearly, the results of appeal before the Alaska Supreme Court has had and would have material consequences on Bolt's estate.

Respondent obtained a statutorily defective ex-parte relief from stay from the U.S. Bankruptcy Court after the appeal was well underway. Respondent's *ex parte* relief from stay is statutorily defective and must be vacated. 11 U.S.C. § 362(d) requires "notice and a hearing" prior to a grant of any relief from stay. Respondent's relief from stay order is void since it was entered *ex parte* without hearing as required under 11 U.S.C. § 362(d). 11 U.S.C. § 362 provides for *ex parte* relief from stay only if it clearly appears from specific facts (affidavit or verified action) that immediate and irreparable injury, loss, or damage will result before opposing counsel can be heard. As a matter of law, this court must reverse or nullify the *ex parte* relief from stay order and vacate and withdraw all orders and decisions subsequent to petitioner Bolt's chapter 11 filing. Petitioners are entitled to costs, fees, damages caused or proximately caused by orders, decisions, and opinions entered without jurisdiction in the trial court and Alaska Supreme Court.

Respondent's and its counsel's misconduct in this case was extremely prejudicial to petitioner, was willful, improper, malicious, and in violation of law, and has resulted in enormous waste of judicial time and resources, and has caused

great financial loss, personal injury, damages, and cost to petitioners, giving rise to compensatory and punitive damages under 11 U.S.C. § 362(h) and Fed.R.Civ.P. 11. See Basso, 495 F.2d at 911; see also Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group, 823 F.2d 302, 305 (9th Cir. 1987); Eisler v. Stritzler, 535 F.2d 148, 152 (1st Cir. 1976); Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc., 108 F.R.D. 96, 102-06 (D.N.J. 1985).

Willful violations of the automatic stay against a non-corporate debtor requires a finding of punitive damages. See In re Xavier's of Beville, 172 B.R. 667 (M.D.Fla 1994). Respondent and respondent's counsel's willful violation of 11 U.S.C. § 362 gives rise to sanctions under Fed.R.Civ.P. 11. This court is obligated to review clear errors of law of lower courts as are often repeated by the courts below.

ARGUMENT II — Both the State Superior Court and the Supreme Court erred in continuing the cases without any effective relief from stay orders.

Respondent's counsel obtained an *ex parte* "relief from stay order" that was signed by the bankruptcy court judge after debtor/petitioner had strenuously opposed respondent's initial motion for relief. No preliminary or final hearing was granted to petitioners. Respondent's counsel obtained the order which was signed, without change or comment and which was never serviced on petitioner or discussed with petitioner or their insurance appointed counsel prior to the judge's signature. The relief from stay order was statutorily defective from the outset. 11 U.S.C. § 362(a) provides an automatic stay of

> (1) the commencement or continuation, including the issuance or employment of

> process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

Any relief from stay is provided under 11 U.S.C. § 362(d) which states in part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from stay...

Clearly, as the order on its face evidences, there was no proper notice and equally clear was the fact that no hearing, either preliminary or final hearing, as statutorily required under 11 U.S.C. § 362(d), was allowed before the order was signed, making the order for relief from stay statutorily defective and void.

ARGUMENT III — The trial court's issue preclusion order of March 31, 1992, is both unconstitutional and statutorily defective.

Having lost its motion for summary judgment on October 19, 1991, respondent immediately resorted to default sanction tactics to win the case. Knowing respondent had no case on the merits and that defendants/ petitioner's cross motion for summary judgment, as a matter of law, on the assignment/cancellation documents was more likely than not to be granted, respondent maliciously and intentionally set out to win the case on default discovery sanctions although respondent's counsel had certified the case ready for trial and

filed their witness list and their list of exhibits previously obtained by discovery from petitioner. See App. A4-A6.

Notwithstanding, respondent's counsel filed a motion for sanctions and asserted defendants/petitioners had made no discovery — not even one document, while respondent's counsel was certifying her readiness for trial and had specifically identified a list of 131 specific documents — to include an audit report of the period in question for CRI which described in detail the Nabesna Mining Venture financial status, current up to February 28, 1989. This audit report was prepared by a big eight accounting firm after a detailed and comprehensive audit.

The March 31, 1992, preclusion order (App. A2-A3) was walked through the court *ex parte* by respondent's counsel. Neither respondents' insurer appointed counsel nor any defendant/petitioner was allowed to review the preclusion order prior to the trial court judge signing the order — as presented verbatim by respondent's counsel. The preclusion order was signed without notice or hearing or any chance for objection or opposition. The preclusion order effectively deprived defendants of their leasehold property rights and amounted to a default litigation ending sanction, in violation of defendants' substantive constitutional due process rights and absent of any clear and convincing evidence that petitioner had engaged in any fraudulent transaction. Such litigation ending preclusion sanction order must be vacated based on the following arguments. The trial court summarily entered the preclusion order and litigation ending default orders and by the amended final judgment order deprived the defendants of property rights without due process. The court erroneously established

petitioner had fraudulently cancelled the assignments to CRI; granted "all right, title, and interest" in property to plaintiff; and established monetary liability without a hearing — all of which violate procedural due process.

Due process concerns are great when harsh preclusion order and litigation ending sanctions are imposed. Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 783 n.9 (9th Cir. 1983). Sanctions which end litigation are generally disfavored and may deny due process. Alaska Trams Corp. v. Alaska Electric Light and Power, 743 P.2d 350, 354 (Alaska 1987). Punitive and unconstitutional litigation ending sanctions violate public policy and injure reputations of fairness and justice.

The punitive sanctions arbitrarily and erroneously imposed here were not properly related to the alleged violations of court orders and were out of all proportion to the limits of due process. Societe Internationale pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 1973; Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909); Hovey v. Elliot, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897); Note of Advisory Committee on Rules to Rule 37, Fed.R.Civ.P.; U.S. Const. Amend. XIV § 1; Alaska Const. Art. I, § 7. The sanctions would also violate due process if non-compliance with a discovery order were deemed not only to impose an inference of willfulness, but also to place the ultimate burden of providing innocence on the non-complying party. The extreme sanctions also infringed defendants' civil jury trial right. U.S. Const. Amend. VII; Alaska Const. Art. I, § 16. Wilson v. Volkswagen of American, Inc., 561 F.2d at 504.

The trial court did not make any factual findings as to relevance of the "Bolt" tax returns but accepted respondent's counsel's alleged but unsupported allegations. The trial court could have decided the case by ruling, as a matter of law, on petitioners' pending cross-motion for summary judgment on Counts I and II. The trial court ignored the relevant test and ruled in respondent's favor without any factual determination or hearings, and signed respondent's drafted issue preclusion order without discussion, and prior to petitioners' review, chance to file opposition, and presentment of evidence which disputes entirely respondent's false assertions.

The punitive sanction orders are fatally deficient because the court did not make fact findings necessary to justify such sanctions and because the record demonstrates: (1) petitioners substantially complied with and did not willfully disobey discovery orders; (2) the alleged violations did not materially hamper or prejudice respondent's case; (3) the extreme sanction did not directly relate to the purported violations; (4) the court failed to adequately consider lesser sanctions; and (5) petitioners had agreed by affidavit to produce Bolt's tax returns for an in camera review by the judge. This court must review and vacate such punitive sanction orders that were entered in violation of constitutional due process and lack of any verifiable evidence of wrongdoing by petitioners.

ARGUMENT IV — The trial court committed legal error and abused its discretion by entering sanction orders establishing Petitioners **committed acts of fraud without any clear and convincing evidence.**

The preclusion order signed on March 31, 1992, established fraud against "Bolt", "NMP", and "WMMP". Such

order violated Alaska law and Rules of Civil Procedure. See App. A2-A3.

Respondent Ptarmigan's motions for sanctions were unfounded, totally without merit, and do not come close to requirements of court rules or law as to establishment of fraud. Respondent's initial complaint had stated no such claim for which relief could be granted, Petitioners had not willfully violated any discovery order, necessary and indispensable parties were not before the court. The court committed a manifest abuse of discretion in signing the preclusion order dated March 31, 1992, without notice or hearing on the issue preclusion. Respondent's claim that petitioners committed fraud must be dismissed for failure to state a claim upon which relief may be granted under Alaska R. Civ. P. 12(h)(2), and for failure to meet the requirements of Alaska R.Civ.P. 9(b) and for other reasons argued herein. Rule 9(b) states:

> **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Federal R.Civ.P. 9(b) requires a pleader of fraud to detail with particularity the time, place, and manner of each act of fraud, plus the role of each defendant in each scheme. Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F.2d 397, 404 (9th Cir. 1991). In Semegen v. Weidner, 780 F.2d 727 (9th Cir. 1985) the court noted that the rule "prevents the filing of a complaint as a pretext for the discovery of unknown wrongs and protects potential

defendants, especially professionals whose reputations in their fields of expertise are most sensitive to slander — from the harm that comes from being charged with the commission of fraudulent acts." Semegen, 780 F.2d at 731. How could petitioners defraud CRI when respondent admits, and the facts clearly establish, that "NMP" and "WMMP" cancelled their assignments to CRI due to non-payment by CRI of the required cash payments called for in NMP's and WMMP's Assignment Agreements with CRI? Further, respondent had no direct privity or standing to assert fraud on behalf of CRI.

The failure of a party to specifically set forth the factual basis for fraud has generally resulted in dismissal of the fraud allegations. Bohna v. Hughes Thorsness Gantz, 828 P.2d 745 (Alaska 1992); Semick v. National Bank of Alaska, 458 P.2d 1003 (Alaska 1969). To allege and prove its fraud claim, respondent had to show that petitioners: (1) made a false or misleading representation, either orally, in writing or by conduct; and (2) that the false or misleading statement was susceptible of knowledge at the time made; and (3) that the false or misleading statement was material; and (4) that respondent relied on petitioners' false or misleading statement; and (5) that respondent's reliance on the false or misleading statement was justifiable; and (6) as a result of respondent's reliance, respondent had suffered some damage or injury; and (7) that when petitioners made the false or misleading statements, they were either aware that the statement was false or misleading or a reasonably careful person under similar circumstances would have been aware that the statements as false or misleading. (Alaska Patterned Civil Jury Instructions 17.01.)

Thus, to state a claim for fraud, Respondent had to allege that it justifiably relied on petitioners' alleged false or misleading statements to respondent. Certainly, NMP could not defraud respondent out of a property interest that respondent never had to begin with. See Bolt v. U.S. and Ptarmigan, 944 F.2d 603 (9th Cir. 1991). Respondent's complaint did not allege anywhere that petitioners made any false or misleading statements to respondent which caused respondent damages. Respondent clearly did not state a cause of action or claim against petitioners for making a fraudulent misrepresentation. Therefore, respondent's fraud claims against petitioners should have been dismissed for failure to state a claim under R.Civ.P. 12(h)(2).

Further, respondent failed to plead its fraud claim with the requisite particularity. Respondent did not specify a single time when the intent to defraud allegedly occurred. Respondent did not state who was allegedly involved in the transaction. Respondent did not set forth a single instance where the alleged fraud took place. Respondent did not specify a single false representation, and did not state when or where any false representation allegedly occurred, or even who allegedly made any false representation. Respondent only claimed that petitioners cancelled the assignments with "an intent to defraud CRI." Respondent did not state the name of the person who allegedly made these statements or what his relationship was to petitioners. Respondent's complaint does not identify a single instance of who did what to "defraud CRI."

Also, it is well established that where fraud is alleged upon information and belief, R.Civ.P. 9(b) requires a statement

of the source of the information and the facts upon which the belief is founded. Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 379 (2nd Cir. 1974); Decker v. Massey-Ferguson, Ltd., 534 F.Supp. 873, 878 (S.D.N.Y. 1981). Respondent failed on both counts.

Respondent's complaint is mute as to the identity of the sources from which it allegedly derived the "facts" which gave rise to its allegations of intent to defraud, let alone as to how any of these sources provide the requisite factual support for the complaint's accusations. Decker, 534 F.Supp. 878.

In addition, respondent's complaint lacks particularity as to what the petitioners obtained from the fraudulent acts. The complaint states, "defendants intent to defraud CRI of the White Mountain and Rambler mining claims and to hinder and cloud respondent's right to the Rambler and White Mountain mining claims." Respondent's complaint fails on its face for two reasons. One, respondent had no right, title or interest in or to the Rambler claims on July 1, 1983, when respondent leased the Rambler claims to petitioners under the Rambler Mining Grants. Ptarmigan's own negligence by not filing the required annual assessment notice as required under federal law for the prior year (1982) caused forfeiture of the Rambler claims and caused all Rambler claims to be void when respondent entered into the Grant. See Bolt v. U.S and Ptarmigan, 944 F.2d 603 (9th Cir. 1991).

Two, as to the WMMP Grant, after the cancellation by WMMP was recorded, WMMP expressly notified respondent and made the August 1989, monthly payment of $5,000 to respondent for the required payment under the WMMP Grant. Ptarmigan accepted payment from "WMMP" without any

reservation which ratified respondent's mining grant to the patented historical gold mine claims. This payment brought the total paid to respondent under the Grants to more than $200,000.

The Ninth Circuit addressed fraud issues in Lancaster Community Hospital v. Antelope Valley Hospital District, 940 F.2d 397 (9th Cir. 1991). There, the Ninth Circuit held that the plaintiff's mail fraud claims could not withstand a motion for partial summary judgment because there was no evidence that the defendant had deprived the plaintiff of money or property rights. See, Lancaster Community Hospital, 940 F.2d at 405. The same reasoning applies in the instant case. It cannot be said respondent lost property rights to the Rambler NMP's acts when respondent had no right, title, or interest to the Rambler claims when the Grant of mining rights was offered to petitioner by respondent. The Ninth Circuit has addressed the issues of intent to defraud in United States v. Lew, 875 F.2d 219 (9th Cir. 1989) and has made it clear that the intent to defraud must be to obtain money or property from one who is deceived. The Ninth Circuit relied on Hammerschmidt v. United States, 265 U.S. 182, 44 S.Ct. 411, 68 L.Ed. 968 (1924).

Based on the above U.S. Supreme Court holding, unless one is deprived of something of value, one cannot claim of being defrauded. The Ninth Circuit Court of Appeals in Bolt v. United States and Ptarmigan, 944 F.2d 603 (9th Cir. 1991) addressed the issues of respondent's own negligence and misconduct in losing any right, title, and interest to Ptarmigan's Rambler claims as a result of respondent's failure to comply with federal law requiring annual labor and timely filing notices

of assessment. In Bolt, the Ninth Circuit held Ptarmigan/Stanley had forfeited any right, title, and interest to the Rambler claims on December 31, 1982, based on United States v. Locke, 471 U.S. 84 (1985). Respondent had no right, title, or interest when it signed the Grant of Mining Rights dated July 1, 1983, with Bolt. As a clear matter of law, respondent has no right to assert fraud when Ptarmigan had no rights in the Rambler claims to be defrauded out of.

Notwithstanding the arguments made above, Count II of respondent's original complaint alleged that petitioners had cancelled NMP's and WMMP's agreement to CRI with the intent of defrauding CRI. Count II alleged that petitioners had cancelled the agreement with CRI with an intent to cloud Ptarmigan's title.

Respondent's allegations that CRI had been defrauded was apparently based upon the trustee's deed executed on September 12, 1990, in the CRI bankruptcy case. The trustee's deed only gave respondent the right to claim that the cancellation of lease agreements were "not effective or were voidable." No other rights of CRI were passed to respondent. More importantly, the CRI trustee had no property interest to sell to respondent as he purported to do by the trustee's deed since the trustee did not attempt to assume or reject any potential executory contract or unexpired lease until after the 60-day statutory period under 11 U.S.C. § 365.

Additionally, respondent obtained a statutorily defective relief from stay order from the bankruptcy court without notice or hearing in the CRI bankruptcy case. Such relief from stay orders are routinely entered by the U.S. Bankruptcy Court,

District of Alaska without notice or hearing — an often clear error of law that should be checked.

CONCLUSION

Petitioners should have equal access and equal treatment under the constitution and law in the appellate review process. Obviously the Alaska Supreme Court has glossed over the briefs and issued their split decision affirming the trial court's preclusion order which violated substantive constitutional due process rights and ignored the clear and convincing evidence standards set forth by this court. Such conduct constitutes clear legal error and must be reversed. Further, the Alaska Supreme Court has turned its head on the Bankruptcy Code and well settled law on the automatic stay provisions under 11 U.S.C. § 362 and provisions of 11 U.S.C. § 365. Petitioners respectfully request this court issue a writ requiring full review of this case. The appearances of injustice of this case requires full review. Further, petitioners are entitled to protection, equal access, and equal treatment under the law. This court should stop the often repeated judicial activism by the Alaska Supreme Court and vacate its November 1995, erroneous decision affirming errors of law and rewarding unconstitutional violations of due process.

Respectfully submitted,

ALEX WAYNE BOLT
1317 W. Northern Lights, #100
Anchorage, Alaska 99503
(907) 258-6100
Petitioner

March 27, 1996

APPENDIX

THE SUPREME COURT OF THE STATE OF ALASKA

White Mountain Mining,)
)
Appellant,)
vs.)
)
Ptarmigan,)
Appellee.)
_____)

Supreme Court Case No. S5743

***** ORDER ***** 12/28/95

S-5743/5744 It is ordered: The petitions for rehearing filed by White Mountain Mining Partners and Nabesna Mining Partners, both filed on December 4, 1995, are denied. Entered at the direction of the Supreme Court on December 28, 1995. cc: Justices, Judge Woodward, Appeals Div. 3AN-90-9008 Civil. Publishers (OP#4286 12/24/95). BBS.

Clerk of The Appellate Courts

In The Superior Court For The State Of Alaska
Third Judicial District At Anchorage

Ptarmigan Company, Inc.	)
Plaintiff,	)
vs.	) Preclusion Order
White Mountain Mining	) Dated 3/31/92
Partners, an Alaska Limited	)
Partnership; Nabesna Mining	)
Partners, an Alaska Limited	)
Partnership; and Wayne Bolt,	)
Defendants.	)
	) Case 3AN-90-9008 Civil

PRECLUSION ORDER

On November 27, 1991, plaintiff Ptarmigan Company, Inc. ("Ptarmigan") moved the court, pursuant to Alaska R. Civ. P. 37(b)(2)(A), to establish the fact that the May 10, 1989[1] "Cancellation of 'Assignment of Lease' and Related 'Agreement to Assign Lease and Terminate Option Agreement'" (attachment 1 to this order) and "Cancellation of 'Agreement To Assign Rights' and Related 'Assignment of Lease'" (attachment 2 to this order) (collectively, the "Cancellations") were fraudulent, and therefore void.

The court reviewed the memoranda filed by the parties and the record with respect to Ptarmigan's motion and found that: 1) Bolt had refused to comply with the court's order compelling discovery; 2) that Bolt's noncompliance was willful;

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1. The Cancellations were recorded on May 17, 1989.

and in bad faith; 3) that the fact sought to be established was relevant to the information willfully withheld; and 4) that Ptarmigan made a clear showing that the establishment of the fact was required under the circumstances of the case.

On February 21, 1992 the court issued an order granting Ptarmigan's motion in part, providing that "Defendants shall produce the requested income tax returns within 15 days of this date and pay plaintiff $400.00 by said date or the requested issue preclusion order will be entered."

The court finds, based on an affidavit submitted by counsel for Ptarmigan, that Bolt neither produced the income tax returns nor paid the $400.00 by March 7, 1992, the required deadline. Therefore, the Motion is granted in full and it is hereby established that the cancellations were fraudulent, and are therefore void.

Dated: 3/31/92 /s/ Joan M. Katz
The Honorable Joan M. Katz
Superior Court Judge

In The Superior Court For The State Of Alaska
Third Judicial District At Anchorage

Ptarmigan Company, Inc.	)
Plaintiff,	)
vs.	)
White Mountain Mining	)
Partners, an Alaska Limited	)
Partnership; Nabesna Mining	)
Partners, an Alaska Limited	)
Partnership; and Wayne Bolt,	)
Defendants.	)
	) Case 3AN-90-9008 Civil

MOTION TO SET TRIAL

Plaintiff Ptarmigan Company, Inc., through its counsel Ashburn & Mason, moves this court to set trial for this case. This motion is made pursuant to Civil Rule 16.1(c), and is supported by the accompanying certificate of counsel.

Dated at Anchorage, Alaska this 11th day of December 1991.

/s/ Kirsten Tinglum

In The Superior Court For The State Of Alaska
Third Judicial District At Anchorage

Ptarmigan Company, Inc.	)
Plaintiff,	)
vs.	)
White Mountain Mining	)
Partners, an Alaska Limited	)
Partnership; Nabesna Mining	)
Partners, an Alaska Limited	)
Partnership; and Wayne Bolt,	)
Defendants.	)
	) Case 3AN-90-9008 Civil

CERTIFICATE OF COUNSEL

Kirsten Tinglum, being first duly sworn upon oath, deposes and states:

1. I am counsel for plaintiff Ptarmigan Company, Inc. ("Ptarmigan").

2. The issues in this case have actually been joined.

3. Ptarmigan has complied with all discovery requests.

4. Defendants have refused entirely to cooperate in discovery and there is pending before the court a motion for sanctions.

5. However, on information and belief, defendants are likely never to provide certain critical documents, and resolution of this case should not be delayed to accommodate defendants' bad-faith tactic.

6. With the court's assistance in enforcing discovery through sanctions, all meaningful discovery can be completed in the next 60 days.

7. Ptarmigan filed its witness and exhibit lists on November 25.

8. The deadline for defendants filing their witness and exhibit lists has passed, and defendants have filed nothing; nevertheless, resolution of this case should not await defendants' cooperation.

9. Trial by jury was not timely demanded.

10. Trial is estimated to take eight days.

11. The names, addresses and telephone numbers of those responsible for conduct of the litigation are:

Kirsten Tinglum
Ashburn & Mason, P.C.
1130 West Sixth Avenue, Suite 100
Anchorage, AK 99501
(907) 276-4331

Timothy R. Byrnes
Hughes Thorsness Gantz Powell & Brundin
509 West Third Avenue
Anchorage, AK 99501
(907) 263-8244

12. The parties have stated their compliance with paragraph (k) of Civil Rule 16.1.

FURTHER YOUR AFFIANT SAITH NAUGHT.

/s/ Kirsten Tinglum
(Notarized)

THE SUPREME COURT OF THE STATE OF ALASKA

White Mountain Mining Partners, an Alaska Limited Partnership,and Wayne Bolt,) Appellants, v. Ptarmigan Company, Inc., Appellee.	) Supreme Court No. S-5743/5744) Superior Court No. 3AN-90-9008 CI) OPINION
Nabesna Mining Partners, an Alaska Limited Partnership, Appellant, v. Ptarmigan Company, Inc., Appellee.	) [No. 4286-November 24, 1995]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Joan M. Woodward, Judge.

Appearances: J. Jeffrey Mayhook, Law Offices of J. Jeffrey Mayhook, Anchorage, for Appellant White Mountain Mining Partners. Wayne Bolt, pro se, Anchorage. Kirsten Tinglum, Ashburn & Mason, P.C., Anchorage, for Appellee Ptarmigan Company, Inc.

Before: Moore, Chief Justice, Rabinowitz, Matthews, Compton and Eastaugh, Justices.

MATTHEWS, Justice.

The main issues in these cases are whether the trial court erred in entering issue-preclusion sanctions and, in a subsequent order, litigation-ending sanctions. We affirm the order of issue preclusion, vacate the order ending the litigation, remand to the trial court for additional findings and a decision in light of those findings, and retain jurisdiction pending the trial court's decision.

I. FACTS AND PROCEEDINGS

Ptarmigan Company, Inc. (Ptarmigan), is the owner of two groups of mining claims located within the Wrangell-St. Elias National Park and Preserve. The first group, the White Mountain claims, are patented. The second group, the Rambler claims, are unpatented. On July 1, 1983, Ptarmigan granted to Wayne Bolt (Bolt) the mining rights in the Rambler claims in exchange for minimum royalty payments of $1500 per month to begin June 1, 1984, and increasing over time. The grant also provided for production royalties. Bolt was required to perform annual assessment work and do a minimum amount of drilling in the first two years of the grant. The grant contained a force majeure clause, excusing performance of the grant under certain circumstances. The term was ten years, subject to extension year by year by commercial production so long as minimum royalties were paid.

On July 2, 1984, Ptarmigan granted mining rights to Bolt in its White Mountain claims. Bolt was to pay Ptarmigan a minimum royalty which increased to $5000 per month as of June 1, 1988. In addition, a production royalty was to be paid to the extent that the production royalty due exceeded the minimum royalty. The term of the agreement was fifteen years subject to extension year by year by commercial production so

long as minimum royalties were paid. This agreement also had a force majeure clause.

By mutual agreement the parties amended the Rambler grant on July 2, 1984. Under the amendment, Bolt's obligations under the grant were suspended due to action by the Bureau of Land Management declaring that the Rambler claims were void. Bolt's obligations were to resume if and when Ptarmigan was able to establish its right, title and interest to the Rambler claims. If the Rambler claims were lost Bolt was to be allowed certain credits on the White Mountain claims. These were confusingly described in the amendment as "not to exceed fifty thousand dollars ($50,000) and up to the four hundred twenty-five thousand dollars ($425,000) Wayne Bolt expended on the Rambler claims during 1983."

Bolt assigned the Rambler grant to Nabesna Mining Partners (NMP), an Alaska limited partnership of which Bolt is the general partner. Bolt assigned the White Mountain grant to White Mountain Mining Partners (WMMP), another Alaska limited partnership of which Bolt was also general partner.

In March of 1986, WMMP granted Colorado Resources, Inc. (CRI), a publicly traded Washington corporation, an option on the White Mountain claims in exchange for cash and CRI stock. Bolt became a CRI director in 1987 and president of the company in 1988. CRI began negotiating with Newmont Mining Corporation, a large international gold producer. On September 27, 1988, NMP assigned the Rambler claim grant to CRI in exchange for CRI stock and a $50,000 demand note. On the same day, WMMP assigned the White Mountain grant to CRI pursuant to the previously granted option in exchange for additional CRI stock

and a demand note for $50,000. Both notes from CRI contained strict forfeiture clauses purporting to give the payees the right to nullify the assignments on nonpayment. A month later, CRI assigned both grants to Newmont. The agreement with Newmont recites that Newmont paid $110,000 to CRI on execution of the agreement and contains a promise to pay a $75,000 annual royalty on the first day of May 1989, 1990, and 1991. Thereafter the annual royalty was to increase. A production royalty was also provided for.

At some point a derivative suit on behalf of certain shareholders of CRI was filed against Bolt. On May 10, 1989, WMMP and NMP executed and later recorded documents purporting to cancel for nonpayment the assignments of the White Mountain and Rambler grants to CRI. On May 30, 1989, Newmont terminated its agreement with CRI under which Newmont had been granted the White Mountain and Rambler claims. In a letter of that date Newmont asked CRI whether "it wish[ed] to receive an assignment of the Underlying Agreements and Properties." On July 7, 1989, Newmont forwarded an executed reassignment to CRI. On August 30, 1989, Newmont wrote to Ptarmigan, stating that Newmont interpreted inaction by CRI as an election not to accept reassignment of the claims. Newmont expressed its desire to terminate its interests in the grants. On September 21, 1989, Newmont quit-claimed its interest in the grants to Ptarmigan and paid Ptarmigan $5000 as the "final $5000 payment due under the captioned Grants."

Until September of 1989 the $5000 monthly royalty due Ptarmigan under the original White Mountain grant was regularly paid. The payment of the Rambler grant was

executed. On September 1, 1989, Bolt, on behalf of WMMP, invoked the force majeure clause of the original White Mountain grant, stating that "[m]onthly payments are now in abeyance" because of an injunction prohibiting mining in certain national parks. Bolt promised to use his best efforts to gain approval from the court for a plan of operation which would lift the injunction as to the White Mountain claims. On September 11, 1989, CRI filed a petition in bankruptcy under Chapter 7 of the Bankruptcy Act. On September 17, 1990, the trustee for CRI quit-claimed CRI's interest in the mining claims to Ptarmigan in exchange for $3500.

On October 31, 1990, Ptarmigan sued Bolt, WMMP and NMP in the superior court. Ptarmigan's suit contains three counts. The first count alleges that Ptarmigan owns the claims by virtue of its original ownership and the quit-claim deeds from CRI and Newmont, and that WMMP's, NMP's, and Bolt's claims by virtue of the May 1989 cancellations "are without right." In the second count, Ptarmigan claims that the cancellations were made "with an intent to defraud CRI of the White Mountain and Rambler mining claims and to hinder and cloud Ptarmigan's rights to the Rambler and White Mountain

mining claims," and are therefore void under AS 34.40.010.[1] The third count claimed that Bolt was in breach of his contract with Ptarmigan in two respects: (1) by failing to pay the $5000 monthly royalty since September of 1989, and (2) by assigning the White Mountain and Rambler claims to CRI and permitting CRI to assign the claims to Newmont.

Ptarmigan requested the following relief: (1) that the May 1989 cancellations be voided and removed from the chain of title to the White Mountain and Rambler claims; (2) that Bolt pay damages for the missed royalty payments from "October 1989 to September 1990," plus interest; and (3) in the alternative, that the original grant of mining rights to Bolt be terminated for breach of contract and that Bolt be required to

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1. The complaint cites AS 34.40.810. This is an evident typographical error as such a section does not exist. Alaska Statute 34.40.010 provides:

> A conveyance or assignment, in writing or otherwise, of an estate of interest in land, or in goods, or things in action, or of rents or profits issuing from them or a charge upon land, goods, or things in action, or upon the rents or profits from them, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, or a bond or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded is void.

pay damages in the amount of the missed royalty payments from October 1989 to the date of termination. In addition Ptarmigan requested interest, costs and attorney's fees.

Bolt answered the complaint, asserted a number of affirmative defenses including waiver, estoppel and ratification, asked for an affirmative ruling from the court that Ptarmigan's "only interest in the White Mountain and Rambler claims is as owner and lessor of such claims," and demanded a jury trial.

On March 4, 1991, Ptarmigan propounded comprehensive interrogatories and requests for production. On July 3, 1991, Ptarmigan moved for an order compelling responses to the requests for production and to certain of the interrogatories. In addition Ptarmigan sought an order compelling compliance with Alaska Civil Rule 16.1(k).[2] The motion was opposed on the grounds that Bolt had complied with discovery, had "provided thousands of pages of responsive documents, and ... answered interrogatories and requests to admit [and] timely objected to the remainder of the requests to produce interrogatories and requests to admit." Bolt also responded to the motion to compel compliance with Civil Rule 16.1(k), generally noting that his response to the motion to compel covered the items required to be produced under

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2. Civil Rule 16.1(k) requires each party without formal request or motion to furnish to other parties certain specified documents germane to the case, including "all relevant contracts and all written and recorded communications, memoranda, and notes which contain evidence relevant to the interpretation of such contracts and any claimed breaches thereof."

16.1(k) and that the other items mentioned in the rule were inapplicable except for insurance documents, as to which Bolt opined that there was no "need for a court order to have those produced." On October 19, 1991, the superior court entered an order compelling discovery, requiring the defendants to answer certain of the interrogatories, and to respond to most of the requests for production within thirty days.

The defendants responded to the requests for production on November 18, 1991. In general, the responses identified where the documents could be inspected, identified the documents as voluminous, and asked for prior notice as to when inspection would take place. However, concerning the requests for the personal federal income tax returns for Wayne Bolt and Ann Bolt for 1986 through 1990, the defendants' response was different. The response opened by pointing out that Ptarmigan had refused to produce copies of its tax returns in response to a request for production by defendants on the ground of relevance, and invited Ptarmigan to limit its discovery requests reciprocally. Next the response asked Ptarmigan to explain why the returns were relevant and then turned to an examination of case law recognizing a taxpayer's privacy interest in the taxpayer's income tax return. Finally, the defendants concluded by stating that if Ptarmigan continued to insist on production of the tax returns, Bolt would produce the returns in court for in-camera review. The concluding paragraphs of the response to the requests for production read as follows:

> Defendants conclude by reiterating their desire and intent to comply with the court's order and with all reasonable discovery requests

> in a manner and with reasonable procedures which they believe will carry out the intention of the court.
>
> Finally, to the extent that [Ptarmigan] continues to insist on production of the tax returns, defendant Bolt will comply with the court order, and make production, but to the court for an in camera review and inspection, together with an appropriate motion and order limiting discovery and misuse of defendant Bolt's federal income tax return information.

On November 27, 1991, Ptarmigan moved for sanctions for "willful failure" to produce income tax returns. The sanction sought was established as a fact that the May 1989 cancellations of the lease assignments were fraudulent. A few days later counsel for Ptarmigan filed an affidavit which stated that she and counsel for Bolt had arranged that on December 4, 1991, she would be allowed to inspect eight boxes of documents belonging to the defendants. She related that on the day before the event counsel for Bolt reported to her that Bolt had without explanation demanded that the eight boxes be returned to him and that Bolt's counsel complied with this request.

While the motion for sanctions was pending, Ptarmigan moved to have the case set for trial, stating that, "[w]ith the court's assistance in enforcing discovery through sanctions, all meaningful discovery can be completed in the next 60 days." Bolt's counsel obtained an extension of time in which to respond to the motion for sanctions. On January 6, 1992, the defendants responded to the motion, again arguing that the Bolts' tax returns were irrelevant and that Ptarmigan had

refused to produce its tax returns. Concerning relevance, the defendants argued that Ptarmigan was not truly sincere about obtaining information from them and was only interested in obtaining sanctions. The defendants argued that if Ptarmigan were interested in obtaining information, it would depose Bolt. The defendants concluded:

> The court should deny the motion for sanctions and issue a protective order against disclosure of tax returns, unless and until Ptarmigan, after deposing Mr. Bolt, can make a strong showing of relevance and need, and can justify a sufficiently narrow breach of the normal rules of confidentiality which govern tax returns, tailored to the circumstances of this case.

Along with their opposition to the motion for sanctions, the defendants moved for a protective order "preventing, limiting, or conditioning [Ptarmigan's] right to inspect personal income tax returns of Ann Bolt and Wayne Bolt," supported by essentially the same grounds as their opposition to the motion for sanctions.

Ptarmigan's counsel then sought to arrange Bolt's deposition and noticed it for February 11, 1992. The deposition did not take place, however, as Bolt's counsel was initially unable to reach Bolt and eventually received a letter from Bolt stating that he refused to be deposed.

On February 13, 1992, before the motion for sanctions was ruled on, the trial court issued a pretrial order setting the case for trial on May 11, 1992. Also while the motion for sanctions was pending Ptarmigan filed a second motion for

sanctions on February 20, 1992. The second motion asked that the court enter a default judgment against the defendants for their refusal to comply with the court's October 1991 discovery order.

On February 21, 1992, Judge Woodward denied the defendants' motion for protective order and granted, in part, the first motion for sanctions. The order required production of the requested income tax returns within fifteen days and payment of $400 "or the requested issue preclusion order will be entered."[3] The fifteen-day deadline established by the trial court's order of February 21, 1992, passed without production of the requested income tax returns. Accordingly, on March 31, 1992, Judge Woodward granted Ptarmigan's first motion for sanctions and entered an order establishing that the May 1989 cancellations were fraudulent. The order states:

> 1) Bolt had refused to comply with the court's order compelling discovery; 2) that Bolt's noncompliance was willful and in bad faith; 3) that the fact sought to be established was relevant to the information willfully withheld; and 4) that Ptarmigan made a clear showing that the establishment of the fact was required under the circumstances of the case.

On April 13, 1992, defendants responded to the second motion for sanctions. Defendants argued that they had

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3. Judge Woodward also observed "[d]efendants are not entitled to wait until after a motion to compel has been granted to brief for the first time their arguments in support of their specific objections to discovery which has been compelled."

provided much information to Ptarmigan in response to Ptarmigan's discovery requests and that Ptarmigan had made no showing as to how the nonproduction of any particular document had any relevance to its claims. Defendants also argued that plaintiff had moved for summary judgment and for trial and that both motions were inconsistent with any assertion that plaintiff needed hundreds of thousands of additional documents in order to prepare for trial. Defendants' counsel also offered the deposition of Bolt, stating that Bolt "now advises that ... he would readily participate," and asked for an evidentiary hearing so that Bolt could testify and full consideration of all the relevant factors could be assured.

On April 21, the defendants moved to remove the case from the trial calendar. The motion was opposed by Ptarmigan.

On April 27, 1992, the trial court scheduled an evidentiary hearing on Ptarmigan's second motion for sanctions for May 1, 1992. The court ordered Bolt "to bring with him to the hearing every single document previously ordered to be produced. The court can envision no excuse in this regard that will be tolerated."

At the May 1 hearing, Bolt appeared with counsel and seven cartons of records. Counsel represented that the cartons contained about 16,000 pages of documents and that another seven cartons of records, containing another 15,000 pages, were in counsel's office in the process of being copied. The records did not include the defendants' tax returns which had been requested, though Bolt stated that he had brought some of the tax returns with him.

At the conclusion of the hearing, the trial court granted the second motion for sanctions and ordered the default of the defendants. The court found that Bolt's conduct "exhibited willfulness beyond any doubt." The court did not find that there were documents which had not been produced which were relevant to the case in its post-preclusion-order context. Instead, the court found that in order for appellee's counsel to understand the documents that had been, or were in the process of being, produced, a continuance of the upcoming trial date would be necessary. The court stated:

> In this case, there appears at this juncture to be no remedy short of default that fits the conduct engaged in by Mr. Bolt. Ms. Tinglum [Ptarmigan's counsel] initially suggested at least one other option, [prohibiting Bolt from testifying at trial,] a very dire sanction. And she was forced to back down on that when it became evident that to be safe from her perspective she would have to have access to the documents; have to have an opportunity to examine them; and that inevitably that would require a substantial delay of the trial.
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> This after all [is] what Mr. Bolt wanted. To do other than grant the default in this instance would be to give the defendants in this case precisely what they were hoping to achieve by their dilatory tactics. And I decline to make such a mockery of the court system and of our discovery orders, as that would accomplish.

The court thereupon entered an order of default on the second motion for sanctions and a final order and judgment quieting title to the Rambler and White Mountain claims in favor of Ptarmigan.

Appellants challenge the preclusion order and the order of default on the grounds that the personal tax returns of the Bolts were not relevant, Bolt's noncompliance was not willful, the noncompliance did not materially hamper or prejudice Ptarmigan's case, the sanctions did not directly relate to the violations, and the court did not adequately consider lesser sanctions.

II. DISCUSSION

In determining whether a trial court abused its discretion in entering issue-establishment or litigation-ending sanctions, a three-step analysis is used. There must be (1) a finding of willfulness; (2) a record that indicates a reasonable exploration of possible and meaningful alternatives; and (3) a sufficient relationship between the discovery materials and the case.[4]

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4. In Underwriters at Lloyd's London v. The Narrows, 846 P.2d 118, 119-20 (Alaska 1993), we stated:

> The law on Rule 37 sanctions in Alaska is well settled. Issue establishment under Rule 37(b), that is, conclusively resolving an issue against a party who does not comply with discovery orders, is an "extreme sanction which should be used only in extreme cases." Otis Elevator Co. v. Garber, 820 P.2d 1072, 1074 (Alaska 1991). For this reason, the trial court

(continued...)

A. First Sanction

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4. (...continued)
must find that the non-complying party "willfully" violated the discovery order in question. Alaska Trams Corp. v. Alaska Elec. Light & Power, 743 P.2d 350, 354 (Alaska 1987), cert. denied, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988). "Willfulness" is defined as the "conscious intent to impede discovery, and not mere delay, inability or good faith resistance." Hawes Firearms Co. v. Edwards, 634 P.2d 377, 378 (Alaska 1981). We have held that before a court may impose litigation ending sanctions for discovery violations the record must clearly indicate a reasonable exploration of possible and meaningful alternatives to dismissal. Sandstrom & Sons, Inc. v. State, 843 P.2d 645 (Alaska 1992). Finally, the sanction must be "sufficiently related" to the discovery violation. Honda Motor Co. v. Salzman, 751 P.2d 489, 493 (Alaska 1988). We must determine "if the established issue is an 'element of the dispute that cannot be determined on the merits without disclosure of the evidence the court has ordered the party to produce.'" Id. (quoting Hazen v. Municipality of Anchorage, 718 P.2d 456, 460 (Alaska 1986)).

Concerning the first sanction of issue establishment, there is ample evidence supporting the superior court's finding that Bolt's noncompliance was willful. Prior to entry of the March 31 establishment order, two discovery orders were entered, one on October 19, 1991, and the second on February 21, 1992, neither of which Bolt obeyed. The second order gave Bolt fifteen days to produce the tax returns and to pay Ptarmigan $400 as a monetary sanction, or suffer the entry of the establishment order. Bolt still refused to turn over any of the tax returns or pay monetary sanctions to Ptarmigan. Thus, despite two orders, two separate deadlines, and one specific warning that the requested sanction would be imposed, Bolt failed to produce any tax returns.

The record in this case also reflects that the superior court considered possible and meaningful alternatives to the issue-establishment sanctions. Prior to the March 31 Establishment Order, the court not only considered, but actually tried imposing the lesser alternative of a monetary fine. Its February 21 order required Bolt to pay $400 and produce the tax returns compelled by the October 19 order within fifteen days. Bolt failed to pay the monetary sanction and produce the tax returns by the new deadline.

Concerning the third step in the analysis, that of relevance, the issue of wrongful cancellation appears to be sufficiently related to the discovery request. In describing the relevance of the tax returns, Ptarmigan stated:

> [t]hese documents [the 1986-1990 tax returns of Wayne and Ann Bolt and Bolt's company, Alaska Drilling] are critical to Ptarmigan's theory that the May, 1989 cancellations were a

> fraud as they may evidence that while he controlled WMMP, NMP, Alaska Drilling and Colorado Resources, Inc. ("CRI"), Bolt was lining his own pockets (often through Alaska Drilling) with CRI funds while portraying to the world and CRI shareholders that CRI could not afford the $50,000 required to avoid the cancellation.

(Emphasis added.) The income tax returns sought by Ptarmigan were thus potentially relevant to the question of whether the notes due from CRI to the partnerships had been paid. Accordingly, the superior court was correct in ruling that the tax returns were sufficiently related to the issue of wrongful cancellation to justify the first sanction imposed.

B. Second Sanction

As noted, Bolt's counsel brought seven cartons of records to the May 1 hearing. He stated that these cartons contained about 16,000 documents and that another seven cartons containing about 15,000 documents were in his office and were then being copied for production. He stated that his office could only copy about 10,000 documents per day, and that the documents would be given to plaintiff's counsel when copying was completed. The failure to bring all fourteen cartons to the May 1 hearing violated the court's April 27, 1992 order. However, no grounds exist for questioning the good faith of Bolt's counsel in deciding to continue copying the remaining seven cartons of documents so that copies could be furnished to plaintiff's counsel on the following day rather than to bring them to court. In arguing for the second sanction, plaintiff's counsel did not claim that she had been prejudiced

by the non-production of all fourteen cartons on May 1. Instead, she argued that her problem was that too many documents had been produced for her to meaningfully deal with, given the fact that the trial was only ten days off. In making this argument she assumed that all of the documents in the fourteen cartons had been produced: "They waited until ten days before trial to produce 30,000 documents and argue with a straight face that we should be prepared to go forward on the 11th after deposing Mr. Bolt next week. It is an impossible task." Because of the good faith of Bolt's counsel and the lack of prejudice to Ptarmigan, the decision of Bolt's counsel to continuing copying the documents in the remaining seven cartons rather than bring them to court on May 1 is not a violation which would support serious sanctions. To the extent that the court relied on this violation in entering the order of default the court erred.

However, the fact remains that the documents in the fourteen cartons should have been timely produced in response to the court's order of October 19, 1991. The trial court's finding of willful noncompliance, insofar as it pertains to these documents and the October 19, 1991 order, is supported by the evidence. The same is true with respect to the tax returns which were never produced.

The superior court did not make findings concerning the existence of a relationship between the issues remaining to be tried and the untimely produced documents or the unproduced tax returns. It follows that the court also made no findings as to whether there was a sufficient relationship between the documents and the issues which remained in the case to warrant

litigation ending sanctions.[5] Once the court had established the issue of fraudulent conveyances in the first sanction, the relevance and importance of the documents may reasonably be questioned.

After the issue establishment order was entered, the issues remaining to be litigated were those in the third count of Ptarmigan's complaint: that Bolt was in breach of his contact with Ptarmigan (1) by failing to make the $5,000 monthly royalty payments on the White Mountain claims, and (2) by assigning the claims to other entities without Ptarmigan's permission. Bolt's defense to the first issue doubtless includes the force majeure clause based on his claim that an injunction prohibited mining. See supra, page 5. His defense to the second claim probably will include a claim of ratification based on the fact that Ptarmigan accepted payments from the assignees. The trial as so framed does not appear to be a complex one which requires numerous documents. However, it is possible that the withheld documents are sufficiently related to the issues remaining to be litigated to justify the second sanction.

Because of the lack of findings by the superior court concerning a sufficient relationship between the discovery violation and the issues which remained for trial after the first sanction was entered, we are remanding this case for entry of specific findings on this subject. Based on these findings, the

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5. In Alaska Trams Corp. v. Alaska Electric Light & Power, 743 P.2d 350, 354-55 (Alaska 1987), we spoke of the need that the withheld materials be "substantial, as opposed to incidental, with respect to the issues in the case."

superior court should re-examine whether the sanction of default was appropriate.

We will retain jurisdiction pending receipt of the superior court's findings and decision. The other issues raised by Bolt on appeal will be held in abeyance.

III. CONCLUSION

The superior court's sanction of issue establishment against Bolt is AFFIRMED. The court's sanction of default judgment is VACATED; we REMAND for entry of findings of fact concerning the sufficiency of the relationship between the late produced documents and the withheld tax returns and the issues which remain in the case, and for the trial court's determination as to whether in light of those findings the default sanction was warranted. Jurisdiction is retained.

ORDER AWARDING FEES AND COSTS

File No. S-5743/5744

Under Appellate Rules 508(e) and (f)(1), attorney's fees of $750.00 are awarded to Appellants, and Appellants shall serve and file with this court by December 4, 1995 an itemized and verified bill of costs in compliance with Appellate Rule 508(d).

Entered at the direction of Justice Matthews on November 24, 1995.

Clerk of the Supreme Court
/s/ Cheryl Jones
Deputy Clerk